(6)

No. 87-1651

# In the

# Supreme Court of the United States

OCTOBER TERM, 1988

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

*v.*

DOUGLAS OAKES,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

## Brief of the District Attorney for the Middle District of the Commonwealth of Massachusetts as *Amicus Curiae*

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July, 1988

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

26 pp

## Questions Presented.

I. Whether Massachusetts General Laws c. 272, § 29A effects a limitation on nonexpressive activity thereby rendering erroneous the Supreme Judicial Court's application of First Amendment standards which are pertinent only to limitations upon expressive activity.

II. Whether, assuming *arguendo*, that M.G.L. c. 272, § 29A does occasion a limitation on expressive conduct, the Supreme Judicial Court erred in failing correctly to measure that limitation against the "sufficiently important governmental interest" justification recognized by the United States Supreme Court.

III. Whether the Supreme Judicial Court erred in relying upon an hypothetical instance of overbreadth without assessing the implausibility of the hypothesis or the *de minimus* nature of its impact in relation to the substantial effects of the legitimate reach of M.G.L. c. 272, § 29A.

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## Judgment Below.

The judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, concerning which the petition for writ of certiorari was granted, is reported in *Commonwealth* v. *Oakes*, 401 Mass. 602, 518 N.E.2d 836 (1988).

## Jurisdiction.

The judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered on February 1, 1988. The jurisdiction of the United States Supreme Court has been invoked by petitioner under 28 U.S.C. § 1257(3) (1982).

## Pertinent Constitutional and Statutory Provisions.

United States Constitution, First Amendment:

> Congress shall make no law . . . abridging the freedom of speech or of the press . . . .

United States Constitution, Fourteenth Amendment:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

Massachusetts General Laws c. 272, § 29A:

> Whoever with knowledge that a person is a child under eighteen years of age, or whoever while in possession or such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity or to participate or engage in any act that depicts, describes or represents sexual conduct for purpose of visual representation or reproduction in any book, magazine, pamphlet, motion picture film, photograph, or picture shall be punished by imprisonment in the state prison for a term of not less than ten nor more than twenty years, or by a fine of not



> less than ten thousand dollars nor more than fifty thousand dollars, or by both such fine and imprisonment.
>
> It shall be a defense in any prosecution pursuant to this section that such visual representation or reproduction of any posture or exhibition in a state of nudity was produced, processed, published, printed or manufactured for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library.

Massachusetts General Laws c. 272, § 31:

> As used in section . . . twenty-nine A . . . the following words shall, unless the context requires otherwise, have the following meanings:—
>
> . . . . . .
>
> "Nudity", uncovered or less than opaquely covered post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered male genitals in a discernibly turgid state. For purposes of this definition a female breast is considered uncovered if the nipple or the nipple or areola only are covered. In the case of pre-pubertal persons nudity shall mean uncovered or less than opaquely covered pre-pubertal human genitals or pubic area.

## Statement of Interest.

This brief, *Amicus Curiae*, is offered by the District Attorney for the Middle District of the Commonwealth of Massachusetts. As the senior elected law enforcement official for the Middle

District, a political subdivision of the Commonwealth, and as the public official responsible for the prosecution of the very indictment upon which the instant matter is grounded, the District Attorney is appropriately positioned to serve this Court as *Amicus Curiae*. Sup. Ct. R. 36.4.

## Summary of the Argument.

I

The objective of M.G.L. c. 272, § 29A is the eradication of that form of child abuse which involves the production of pornographic depictions of minors. In pursuit of that goal, the statute focuses exclusively upon the manufacturing, as distinct from the distribution, of child pornography. The conduct it condemns is wholly nonexpressive in character. Hence, the protections afforded by the First Amendment are not implicated, and the Supreme Judicial Court's invocation of those protections is reversible error. *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172, 3178 (1986).

II

Assuming, *arguendo*, that M.G.L. c. 272, § 29A does effect a restriction upon expressive activity, that restriction is justified by a "sufficiently important governmental interest," *United States* v. *O'Brien*, 391 U.S. 367, 376-377 (1968), to wit, the protection of children. That protection is accomplished by criminalizing the conduct of those who would abuse children through the medium of the production of child pornography. Because the four-part standard of *O'Brien* is satisfied by § 29A, the statute's incidental, *de minimus* limitation upon expressive conduct is not violative of the First Amendment. The Supreme Judicial Court erred in finding such a violation on the face of § 29A.



III

The history of Massachusetts' invocation of M.G.L. c. 272, § 29A reveals no prosecution thereunder for the non-lascivious photographing of a minor in a state of nudity. All § 29A prosecutions have been in connection with sexually assaultive behavior or in circumstances other than those which troubled the Supreme Judicial Court. Hence, that Court's concern with respect to the hypothetical overbreadth of § 29A — *viz*, its potential application to "family album" photographs — has no grounding in reality. Additionally, even if it be assumed that the reach of § 29A exceeds its legitimate goal and trespasses into the "family album" territory in a manner uncontemplated by its drafters and protected by the First Amendment, the invasion is not "substantial . . . [when] judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973). Accordingly, given that insubstantiality, the Supreme Judicial Court erred in declaring § 29A unconstitutional on its face by reason of overbreadth.

## Argument.

### Introduction.

Having determined M.G.L. c. 272, § 29A to be in conflict with the First Amendment to the United States Constitution, the Supreme Judicial Court for the Commonwealth of Massachusetts declared the statute to be unconstitutional and reversed Respondent's conviction thereunder. *Commonwealth* v. *Oakes*, 401 Mass. 602, 518 N.E.2d 836 (1988). Petitioner, by means of the instant writ of *certiorari*, has sought review of the Supreme Judicial Court's declaration and a reinstatement of the conviction. *Amicus* concurs with Petitioner's view that

the Supreme Judicial Court's analysis and conclusion are flawed and urges, for the following three reasons, that its judgment be reversed.

## I. Because M.G.L. c. 272, § 29A Criminalizes Only Non-expressive Conduct, the Supreme Judicial Court Erred in Measuring the Statute by First Amendment Standards and by Concluding that the Statute Was, on Its Face, Violative of Those Standards.

The foundation upon which the Supreme Judicial Court has based its conclusion that M.G.L. c. 272, § 29A, is "unconstitutionally overbroad," *Oakes*, 518 N.E.2d at 837, is that Court's assumption that the statute impacts conduct which is expressive in nature. *Id.* at 837. Acknowledging that the conduct addressed by § 29A was the "permitting" of the victim to pose or to be exhibited while nude, *id.* at 837, the Court reasoned that the subsequent conduct of "taking her picture" was so inextricably interwoven with the "permitting" phase that the expressive quality of the "taking her picture" was necessarily also present in the "permitting". *Id.* In sum, the Supreme Judicial Court has theorized that the expressive attributes of "taking her picture" flow back and into the "permitting" conduct condemned by § 29A thereby requiring that the "permitting" be tested, as is any expressive activity, by First Amendment analysis.

The flaws in the Supreme Judicial Court's reasoning lie in its characterization of "taking her picture" as expressive conduct and in its related determination that such a labelling may color the assessment of the distinct act of "permitting". First, *Amicus* suggests that the mere fact of depressing the camera's shutter button, thus exposing the film inside, does not constitute



expressive conduct. Surely, the concept of expression, the *sine qua non* of First Amendment protection, involves more than the physical act of shutter button depression, a preparatory act remote from any expressive activity. *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973), teaches that the "communication of ideas" is that with which the First Amendment is concerned and it is that communicative attribute which enables conduct properly to be characterized as expressive. *Id.* at 67. The triggering of a shutter is not, without more, the communication of an idea and where, as at bar, there is no suggestion that communication is involved, there is no occasion to label the instant conduct — "taking of her picture" — expressive and meriting of First Amendment scrutiny.[1]

Second, the Supreme Judicial Court's willingness to credit the spillover theory, *Oakes*, 518 N.E.2d at 837, is similarly unsound. The Court reasoned that the "permitting" component of defendant's conduct "cannot fairly be isolated . . . from the expressive process of taking her picture". *Id.* Even were we to assume, *arguendo*, that the "taking her picture" component is expressive, there is no logic to the Court's perception of a blending of the "permitting" and the "taking her picture" segments such that the expressive attributes of the latter necessarily leach into the former.

The Massachusetts Legislature, by enacting M.G.L. c. 272, § 29A, voiced its concern that the undeniable harm occasioned

[1] Note that the Supreme Judicial Court found that "no commercial or even non-commercial distribution [of the photographs] was intended or occurred." *Oakes*, 518 N.E.2d at 837. The inference that the "taking her picture" was expressive conduct is thus all the more specious. Furthermore, the Supreme Judicial Court's implicit assumption that triggering the shutter constitutes an expression or communication loses further force when one reflects upon the absurdity that, had there been no film in the camera, Respondent's conduct would nevertheless, in the Court's view, still be expressive and entitled to First Amendment shielding from prosecution notwithstanding the impossibility of communication in those circumstances. The mere snapping of a shutter is not expressive conduct warranting First Amendment inquiry.

by child pornography, *see generally New York* v. *Ferber*, 458 U.S. 747, 756-764 (1982), is best remedied by a discrete governmental assault upon the very roots of the nefarious industry, *viz*, those who incept the process by inveigling minors to pose. The statute reflects the Legislature's awareness that the inducement, whether by compulsion or by friendly persuasion, is an evil separate and distinct from the vice of distribution. *Compare* M.G.L. c. 272, § 29A (criminalizing the preparation) *with* M.G.L. c. 272, § 29B (criminalizing the distribution). Production is at a distance, chronologically and functionally, from dissemination, and the communicative properties of the distribution stage do not, as the Supreme Judicial Court would have it, inevitably gestate in the inducement phase. Thus, *Amicus* disputes *Oakes*' thesis that "permitting" a minor to pose nude "cannot fairly be isolated . . . from the expressive process of taking her picture." *Oakes*, 518 N.E.2d at 837. *Amicus* urges this Court to recognize the disjunction of the two aspects, as has the Massachusetts Legislature, and to reject the notion that whatever expressive qualities reside in the "taking" phase necessarily seep into the "permitting" phase.

Because the "taking" phase is not expressive or, if it is expressive, that aspect of its character is not perforce integral to the "permitting" phase, § 29A's prohibition of the "permitting" conduct presents no threat to expression protected by the First Amendment. There being no expressive activity within the regulatory reach of § 29A, there is no occasion to test the statute to determine its compliance with the First Amendment. *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172, 3177-78 (1986). The Supreme Judicial Court erred in subjecting § 29A to First Amendment measurement and in reversing Respondent's conviction as a consequence of that measurement. *Amicus* urges this Court to remedy that error.



## II. Assuming *Arguendo*, That the Conduct Criminalized by M.G.L. c. 272, § 29A, Is Expressive, A "Sufficiently Important Governmental Interest" Justifies the Incidental Restriction Effected by the Statute.

Should this Court accept, contrary to the contentions offered in Argument I, *supra*, the proposition that the statutory bar to "permitting" a minor to pose in a state of nudity impacts upon expressive conduct, the limitation of which must be exposed to First Amendment analysis, *Amicus* submits that the end of that analysis will be a determination favoring the constitutionality of M.G.L. c. 272, § 29A. The assumption, *arguendo*, that § 29A occasions a restriction upon expressive activity does not foreshadow the conclusion that the First Amendment has therefore been abridged. Indeed, given the circumstances of the challenged statute, its objective, and its reach, application of pertinent First Amendment standards demonstrates that § 29A is wholly compatible with constitutional demands. We proceed to that application.

*United States* v. *O'Brien*, 391 U.S. 367 (1968), addressed the instance of a restrictive statute brought to bear upon conduct claimed to be expressive and thus entitled to First Amendment protection:

> [E]ven on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that [the conduct] . . . is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a *sufficiently important governmental interest* in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

*Id.* at 376. (emphasis added). If, then, we take § 29A, and its preclusions with respect to "permitting" minors to pose in a state of nudity, to be a limitation upon expressive activity, the task set by *O'Brien* is to determine whether a "sufficiently important governmental interest" justifies the limitation.

*O'Brien* acknowledged that the quoted litmus was somewhat imprecise; to attempt to define with particularity the quantum of governmental interest which might provide the justification was to proceed upon a path leading only to ambiguity. *Id.* at 376-377. Nevertheless, in an effort to provide guidance to the legislators who draft limitations and the judges who assess their constitutionality, *O'Brien* observed that

> we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*Id.* at 377. When that four-limbed *O'Brien* test is laid against the statute at bar, the result, *Amicus* suggests, will be a recognition that the incidental limitations on expression occasioned by § 29A's assault on socially offensive conduct are indeed justified by a "sufficiently important governmental interest". *Id.* at 376. We move, then, to the *O'Brien* test.

First, that the Commonwealth may constitutionally establish a statutory scheme which, by criminalizing child pornography, protects its youth from abuse should not now be subject to serious challenge. *New York* v. *Ferber*, 458 U.S. 747, 754-758 (1982), has put to rest any suggestion that the First Amendment



constitutes a wall over which a child pornography preclusion may not prevail. Writing for the Court, Mr. Justice White noted that "the States are entitled to greater leeway in the regulation of pornographic depictions of children. . . . Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Id.* at 756-757. Continuing, he observed that

> The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. . . . The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. *The judgment we think, easily passes muster under the First Amendment.*

*Id.* at 757-758 (footnotes omitted) (emphasis added). *Amicus* submits that the power of the Commonwealth to craft laws, consistent with constitutional demands, aimed at eradicating child pornography and its analog, child abuse, is beyond dispute.

Second, the regulation of expressive activity effected by § 29A "furthers an important or substantial governmental interest . . .." *O'Brien*, 391 U.S. at 377. Certainly, there is no more important or substantial governmental interest than the protection of the physical, mental, and emotional well-being of children. The Commonwealth's protective obligation is seriously compromised when sexual exploitation and abuse — the necessary corollaries to child pornography, *Ferber*, 458 U.S. at 759 n.10 — are not repelled with maximum constitutional

vigor. This Court has characterized the government's prophylactic duty as of "surpassing importance." *Id.* at 757. Accordingly, *O'Brien*'s demand that the governmental interest advanced by the regulation be "important or substantial," *O'Brien*, 391 U.S. at 377, is patently satisfied by § 29A's suppression of child pornography and its offspring, child abuse.

Third, the Commonwealth's concern for the integrity, both physical and mental, of its youth is a "governmental interest . . . unrelated to the suppression of free expression . . . ." *Id.* While the imagination might conjure an extreme hypothetical instance wherein the preclusion of free speech was a result, albeit unintended and remote, of the Commonwealth's attempts to protect its children by punishing those who would suffer them to pose in the nude, those instances are, most assuredly, rare to a point approaching the chimerical[2] and are of *de minimus* concern when viewed in relation to the enormously salutary effects of the reduction in child abuse occasioned by § 29A. *Cf. Ferber*, 458 U.S. at 763-764 (observing that when "the evil to be restricted so overwhelmingly outweighs expressive interests," the First Amendment's shields are not available to protect those interests). Thus, the anti-abuse objectives of § 29A are indeed "unrelated" to any residual suppression of speech.

Fourth, the occasional burdening of expression by operation of § 29A "is no greater than is essential to the furtherance of [the child abuse reduction objective of the statute]." *O'Brien*, 391 U.S. at 377. There is no suggestion, on this record or otherwise, that § 29A has been, or is likely to be, applied to expressive activities other than those which by chance attend

[2] See Argument III, *infra*, wherein appears reference to the extraordinary infrequency of § 29A prosecutions unaccompanied by companion accusations involving sexually assaultive conduct. The message to be drawn therefrom is that, in application as well as intent, § 29A is not ordered toward suppression of expression.



the conduct § 29A was designed to eliminate. And, there is likewise no suggestion that § 29A has, as its primary focus, the suppression of expression. *See generally Stromberg* v. *California*, 283 U.S. 359 (1931) (statute aimed at restricting expression cannot be rescued by reason of its incidental impact upon the noncommunicative conduct which was the vehicle for the expression). In sum, *Amicus* submits that whatever effect § 29A may have upon expression — assuming *arguendo*, that it has *any* such effect — is wholly fortuitous and is decidedly secondary to its finely focused impact upon nonexpressive conduct. The statute's restriction upon communication is no greater than that which is minimally necessary to accomplish its fundamental objective of deterring the production of child pornography.

The *O'Brien* requirements are met by § 29A. If, as the Supreme Judicial Court has assumed, *Oakes*, 518 N.E.2d at 837, the speech and nonspeech aspects of Respondent's conduct are wedded such that § 29A's purposeful restriction of the latter necessarily, albeit inadvertently, restricts the former, then, *Amicus* contends, the statute will nevertheless survive First Amendment inquiry upon a showing of the presence of "a sufficiently important governmental interest in regulating the nonspeech element. . . ." *O'Brien*, 391 U.S. at 376. The Supreme Judicial Court found no such interests because the circumstances of the taking of the instant photographs were not, in that Court's view, sufficiently offensive to "warrant overriding First Amendment freedoms . . . ." *Oakes*, 518 N.E.2d at 837. With all due deference to the Supreme Judicial Court, *Amicus* suggests that the appropriate constitutional inquiry demands an examination focused not on the character of Respondent's conduct, as *Oakes* indulged, *id.*, but, rather, on the governmental interest served by the statute's restriction of expression, as *O'Brien* requires. *O'Brien*, 391 U.S. at 376. The fulcrum question is not the offensiveness, *vel non*, of the

criminal conduct, but the importance of the Commonwealth's interest in making the conduct criminal. Employing that focus, *Amicus* concludes that the First Amendment is not violated by the implementation of § 29A and urges that the Supreme Judicial Court's judgment to the contrary be reversed.

## III. Assuming *Arguendo*, That M.G.L. c. 272, § 29A Occasions a Limitation on Expressive Activity, That Limitation Is Insubstantial When Viewed in Relation to the Statute's Legitimate Applications and, Accordingly, the Statute Is Not Unconstitutionally Overbroad.

An overbreadth analysis need not be indulged should this Court accept the contention, offered in Argument I, *supra*, that the conduct condemned by M.G.L. c. 272, § 29A, is nonexpressive and thus not entitled to First Amendment protection. *New York* v. *Ferber*, 458 U.S. 747, 767-768 (1982); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610-612 (1973); *Commonwealth* v. *Oakes*, 518 N.E.2d at 838-839 (O'Connor, J, dissenting). However, assuming, *arguendo*, that § 29A is viewed by this Court as reaching expressive activity, an overbreadth assessment is appropriate. Proceeding upon that assumption, we next engage the overbreadth inquiry.

The Supreme Judicial Court has determined § 29A to be overbroad because "[i]t criminalizes conduct that virtually every person would regard as lawful." *Commonwealth* v. *Oakes*, 518 N.E.2d at 838 (1988).[3] Applying the *Broadrick* test,[4] the

[3] As the sole example of such inappropriately criminalized conduct, the Court hypothesized that § 29A might reach "a parent who takes a frontal view picture of his or her naked one-year-old running on a beach or romping in a wading pool." *Oakes*, 518 N.E.2d at 838.

[4] *Broadrick*, 413 U.S. at 615.



Massachusetts Court opined that the overbreadth of § 29A was "real" and "substantial." *Id*. *Amicus* disputes that characterization and suggests that the speculative overbreadth, if any, of the statute at bar is *de minimus*, not warranting the facial invalidation of § 29A effected by *Oakes*.

Overbreadth — the doctrine which permits an accused to challenge a statute on account of its asserted unconstitutionality with respect to persons situated in circumstances distinct from the accused's — is itself an exception to the general rule that

> a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.

*Broadrick*, 413 U.S. at 610. The exception is based on the proposition that one, incidentally touched by a statute restrictive of free speech, may be discouraged from expression and, not having been prosecuted, can never vindicate his or her free speech rights. For that reason, the overbreadth doctrine permits the accused, who is prosecuted under the statute, to assert vicariously the violation of First Amendment entitlements experienced by hypothetical third parties. *Id*. at 612. Clearly then, the overbreadth doctrine is itself a deviation from the ordinary course of constitutional analysis and ought not to be indulged without a reason of surpassing merit.[5]

[5] Indeed, *Broadrick* underscored the disfavored character of the overbreadth argument by noting that

> Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been

No such merit appears at bar. The statute alleged to be overbroad is a criminal law claimed by defendant to be potentially inhibitory of others' rights of expression. This Court has not been warmly receptive to the overbreadth allegation brought in analogous contexts. *See, e.g., Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (breach of peace proscription not condemned because it might be unconstitutionally applied to others, but because defendant's conduct did not fit the proscription). *Broadrick* recognized the judicial reluctance to employ the overbreadth rule to criminal statutes:

> Equally important, overbreadth claims, if entertained at all, have been curtailed when invoked against *ordinary criminal laws* that are sought to be applied to protected conduct.

*Broadrick*, 413 U.S. at 613 (emphasis added). A like reluctance should obtain at bar.

Similarly, where the impact upon speech occasioned by the conduct-regulating statute does not involve partisan concerns or have the effect of purging a discrete, identifiable course of thought or communication, this Court's vigilance against overbreadth is exercised with markedly less rigor than would be employed if the peripheral restriction were impacting on advocacy or on a particular, principled proposition. *Cf. Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967). *Broadrick* describes the judicial hesitancy so:

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> invoked when a limiting construction has been or could be placed on the challenged statute.

*Broadrick*, 413 U.S. at 613 (citations omitted). This Court's sentiment has been decidedly contrary to all but the most limited invocations of the overbreadth principle.



> Additionally, overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner.

*Broadrick*, 413 U.S. at 614-615 (citations omitted). *Amicus* submits that § 29A satisfies the *Broadrick* criteria for "less rigid" overbreadth examination, *id.* at 614, because it is most "even-handed" in application. *See id.* at 616. The statute is not "directed at particular groups or viewpoints" and is, therefore, "non-censorial." *Id.* It seeks to regulate conduct without discrimination between classifications of acts or objectives and is, therefore, "neutral." *Id.* When viewed through the prism of the "less exacting overbreadth scrutiny" to which it is entitled by reason of its "neutral, non-censorial" character, *id.* at 614, § 29A is seen to bear none of the stigmata of unconstitutional overbreadth.

In this ambience of judicial reluctance to find unconstitutional overbreadth, we turn to an examination of the Supreme Judicial Court's determination that § 29A is impermissibly overbroad. *Oakes*, 518 N.E.2d at 837-838. *Broadrick* instructs that that examination is to be undertaken with a realization that

> [F]acial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" towards conduct and that conduct — even if expressive — falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.

*Broadrick*, 413 U.S. at 615. But, to recognize that the constitutional imprimatur depends upon the point, on a scale bounded at one end by "pure speech" and at the other by "conduct," at which the statute under scrutiny is placed is not to end the inquiry. There must also be an assessment as to whether or not the placement of the statute at that particular point on the scale intrudes unacceptably upon the values sought to be protected by the First Amendment. *Broadrick* provides guidance upon that question too:

> Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect — at best a prediction — cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

*Id.* In sum, a statute directed to conduct will not be ruled overbroad — that is, unacceptably intruding upon peripheral expressive activity nominally entitled to First Amendment shielding — unless the intrusion is "not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* This Court's task, then, is to determine whether the intrusion claimed at bar is both real and substantial. *Amicus* submits that the instant intrusion is neither.

That the intrusion is neither real nor substantial is patent. The Supreme Judicial Court viewed as a "substantial" intrusion the hypothesis that § 29A reaches the "parent who takes a frontal view picture of his or her naked one-year-old running on a beach or romping in a wading pool." *Oakes*, 518 N.E.2d at 838. There is, however, nothing, beyond that mere assertion in the Court's opinion, which evidences the substantiality of



§ 29A's alleged overbreadth. Indeed, the history of the implementation of § 29A in the Commonwealth constitutes an eloquent refutation of both the *Oakes* suggestion that parental photography is commonly prosecuted and the consequent *Oakes* inference that the overbreadth of § 29A is "real and substantial." *Id.*[6]

It is simply not realistic, based upon the Massachusetts experience reflected in the Appendix to Petitioner's Brief, to maintain that § 29A is likely to be employed to suppress expression. And, even should we assume, *arguendo*, that an incidental diminution of expression may trickle from the invocation of § 29A against nonexpressive conduct, that seepage can hardly be said to rise to the level of "substantial" required

[6]The poverty of the Supreme Judicial Court's conclusion is demonstrated by the reality that family album-style photographs have never been the subject of § 29A prosecutions and that, with few exceptions, § 29A has been invoked only as a companion charge to accusations involving sexually assaultive behavior. See Appendix to Petitioner's Brief wherein are listed all § 29A prosecutions during the past few years. The exceptions to the general rule — *viz*, that § 29A prosecutions are pursued only where incident to charges of sexual assault — are of no value to the proponents of overbreadth because each exception presents a circumstance wholly distinct from the family album hypothesis which concerned the Supreme Judicial Court. The exceptions, as designated in Petitioner's Appendix, are:

> Defendant "4" — § 29A charge was companion to an indictment for dissemination of child pornography.
>
> Defendant "23" — § 29A charge arose out of incidents in which school teacher took photographs of naked teenagers without their knowledge and from behind a one-way mirror as they performed exercises he had earlier directed.
>
> Defendant "8" — No information available as to the circumstances of the § 29A offense.

*Amicus* submits that the record of § 29A prosecutions depicts a statute nearly always applied to conduct incident to sexual assault and, in those non-assaultive instances, to conduct so bizarre and anti-social as to fall outside the "family album" concerns which were central to the Supreme Judicial Court's conclusion of overbreadth.

by *Broadrick*, 413 U.S. at 615. Furthermore, when "judged in relation to the statute's plainly legitimate sweep," *id.*, any occasional impact by § 29A upon expression is dwarfed by the urgent need for the remedies provided by § 29A to combat the malignancy of child sexual abuse. *See generally New York* v. *Ferber*, 458 U.S. 747, 756-764 (1982). The "legitimate sweep" of § 29A enfolds the production of child pornography and, if any expressive activity is inhibited by either the actuality or the potentiality of a § 29A prosecution of nonexpressive conduct in implementation of that "legitimate sweep," then such inhibition will be of little consequence when assessed in the context of the vital contributions made by § 29A to society's effort to mend a most unsightly tear in its fabric.[7]

*Amicus* concludes that M.G.L. c. 272, § 29A is not unconstitutionally overbroad. The overbreadth determination by the Supreme Judicial Court, *Oakes*, 518 N.E.2d at 837-838, did not take into account a host of constitutional verities, *viz*, overbreadth is a doctrine of "last resort," a limited exception to the general rule disfavoring vicarious assertion of constitutional rights, a principle "curtailed" when asserted against criminal laws, and a precept of minimal worth when invoked against a "neutral, non-censorial" restriction of expression on the periphery of the First Amendment. *See Broadrick*, 413 U.S. 610-616. Additionally, the Supreme Judicial Court's assumption that § 29A works a "real . . . [and] substantial" trespass upon protected expression, *Oakes*, 518 N.E.2d at 837-838, is

[7] The infrequency and insubstantiality of the inhibition has been acknowledged by this Court:

> Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute [to medical textbooks and National Geographic pictorials] amount to more than a tiny fraction of the materials within the statute's reach.

*New York* v. *Ferber*, 458 U.S. at 773.



unsupported either in fact or in theory. That Court's overbreadth determination was error, and its condemnation of § 29A ought not to prevail.

## Conclusion.

For the reasons aforestated, *Amicus* urges that the constitutionality of M.G.L. c. 272, § 29A be confirmed and that the Supreme Judicial Court's judgment in *Commonwealth* v. *Oakes*, 401 Mass. 602, 518 N.E.2d 836 (1988), be reversed.

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July, 1988